

# 13

## Business and Human Rights

In some ways, business is good for human rights as it performs a vital function in society by providing jobs, goods, and services.

## 13.1 Introduction to Business and Human Rights

People invest a lot of time and education to find work, they even cross borders in search of better-paying jobs, and these jobs can provide money not only for the worker, but for the worker's family and community. Yet, businesses can violate human rights if companies treat workers badly, pollute the environment, engage in dangerous or corrupt business practices, or are involved in development activities that may displace or marginalize communities. Regardless of their type or size, business enterprises will always have some sort of impact, positive and negative, on human rights. The challenge is that human rights, as they now work, mainly protect people from the power of the State, not from the power of business. As economies and businesses grow, more people may potentially have their rights affected by this sector. Yet, around the world, most countries are still debating the human rights obligations of business. Does a business have the same duties towards people as the State? Or is their purpose only to provide a service for profit? How should communities and States stop business from violating rights?

### Concept

#### Business

This chapter uses the general term 'business' to cover any profit-making organizations. There are different types of businesses: some are owned by people; others are traded on stock markets (meaning that anyone who can afford shares can be part investor of the business). Businesses can employ one person or thousands across many different countries.

Some common definitions are:

- Firms, companies, enterprises: general term for any profit making organization
- Corporations: a legal entity that has rights and duties in some ways similar to individuals
- Trans-national corporations (TNCs) or Multinational Corporations: operate in more than one country and may employ thousands of people and have an economy similar to a medium-sized country

Southeast Asian States have always attracted foreign investment. Sometimes the relationship is exploitative, as when colonial companies extracted resources from Southeast Asian countries before they gained independence. More recently, business has contributed much to national development, with the richest countries in the region benefiting greatly from growing economies. At the same time, many in the region have had their rights violated by business with States doing little to protect them. As this chapter will discuss, the challenge in the field of business and human rights is to, firstly, assess the negative and positive impact of business on human rights. For example, wages and work conditions can be either exploitative if the workers are not getting paid enough, or an opportunity to improve the quality of life of the worker. If it is clear that businesses are violating or otherwise adversely impacting



human rights, the next challenge is to hold them accountable. But the obligations of business to human rights is still under much debate. This chapter examines these issues by, firstly, detailing how business is accountable. Secondly, by examining the organizations that attempt to hold business accountable. And thirdly, by looking at regional responses to violations by business.

## DISCUSSION AND DEBATE

### Business as Duty Bearers

What, precisely, are the human rights obligations of business enterprises? Because business enterprises are not States, they cannot sign or agree to human rights treaties. But they must abide by the laws of the country they are in, which includes respecting human right laws. Articles 29 & 30 of UDHR makes it clear that no State, group, or person (which can be assumed to include business) can infringe upon human rights. But what does this mean in practice?

#### Discussion

- If a social media business does not allow you to express yourself freely on their site, are they removing your freedom of expression? In other words, does the site have a duty to grant you freedom of expression?
- If a hungry homeless person goes into a restaurant and asks for food, does the restaurant have a duty to feed them? Obviously, the person has a right to food and shouldn't go hungry, but is it the restaurant's duty to provide that food?
- If a company supplies water to households, and cuts off people who do not pay their bills, is this denying their right to water? Should the company be obliged to provide water even without payment?

While States must ensure business does not threaten human rights, this duty has been a challenge to enforce. The question is: how to ensure a business respects human rights? While it may not appear difficult for a State to hold a business accountable to national laws, it is also true that companies violate human rights without consequence because of the characteristics of business. If a business is legally a corporation, then it has a legal status which can limit its liability and make it difficult to sanction anyone who may be committing a crime through the business. Businesses can also be very wealthy, enabling them to influence, or even corrupt, government officials. Some types of business, in particular TNCs, can avoid justice because they work across jurisdictions and borders, a feature which can be exploited to protect the business from facing justice. Business enterprises have the ability to keep their management outside the country where they work isolating them from legal sanctions. In many cases they can outsource their work to a third party using foreign labour, isolating them from violations within a particular country. In addition, they can also easily extract their profits from those countries. This dynamic, known as **capital mobility**, allows businesses to move to the State offering the most attractive conditions. As a consequence, business has leverage over States and workers. In particular, they can increase their profits by seeking out countries with the lowest wages and the

#### Capital Mobility

Capital mobility refers to the ability of business enterprises and investors to move their money (capital) and operations between different countries. Mobility makes it hard to regulate capital or obtain remedy for human rights violations.



### Race to the Bottom

This occurs when a business shops around different countries to seek the lowest wages and weakest regulations to maximize profits. This puts pressure on developing countries to lower their wages or weaken environmental protection to attract businesses.

weakest regulations. This is known as the **race to the bottom**. But States and workers are not entirely powerless as there are ways and means to ensure accountability, as this chapter will later detail. Even if some business enterprises appear dismissive of human rights, certain responsibilities and laws must still be adhered to. In general, the trend has been for business to become more responsible, but more work is needed to ensure labour rights are fully protected. This chapter will examine the different ways businesses interact with human rights, and examine the various instruments that help promote business accountability.

## 13.2 Labour Rights as Human Rights

The International Labour Organization (ILO) plays a significant role in workers' rights (as noted in Chapter 7). As the ILO approaches its centenary in 2019, it is worth remembering its role in labour rights and how this links to human rights. The ILO was founded in 1919 as part of the Treaty of Versailles that brought an end to World War I. During the Paris Peace Conference, the Allied victors saw the need to create a body alongside the League of Nations to protect and promote labour rights, and so the ILO was devised. Significantly, those attending the peace discussions recognised that any chance of a lasting and universal peace would have to promote social justice and safeguard the interests of labour as many believed that the exploitation of workers throughout the world was a major contributor to the outbreak of war. The preamble of the 1920 ILO Constitution notes this by saying:

[W]hereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required (ILO Constitution, Preamble).

### FOCUS ON

#### An Overview of Labour Rights

Labour rights are found in a number of human rights treaties, and also in many ILO conventions. While an extensive list of rights would be too long to include here, some core labour rights include:

- The right to work (UDHR Art 23, ICESCR Art 6)
- The right to choose employment (UDHR Art 23, ICESCR Art 6)
- The right to just and favourable conditions of work (UDHR Art 23, ICESCR Art 7)
- Equal pay for equal work (UDHR Art 23, ICESCR Art 7)
- The right to a living wage, or a wage that one can live off (UDHR, Art 23, ICESCR Art 7)
- The right to form and to join trade unions (UDHR Art 23, ICESCR Art 8)
- The right to limited working hours and holidays with pay (UDHR Art 24, ICESCR Art 7)



Additional rights include:

- Maternity leave
- Minimum wage
- Minimum working age
- Equal rights to a promotion at work
- Equal working rights between men and women

Unsurprisingly, the term ‘human rights’ cannot be found in the ILO’s Constitution, given it was written decades before universal human rights appeared in the UDHR. The earliest statement referring to the term can be found in the 1944 Declaration of Philadelphia, annexed to the ILO Constitution, which positions workers’ rights as human rights, stating that “all human beings have rights to ... freedom and dignity.” But it was not until after World War II that the ILO integrated human rights into workers’ rights. As a specialized agency in the UN, the ILO works in parallel with the UN human rights regime. The ILO’s current mandate sees labour rights in a broader context:

The main aims of the ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.

After all, the rights to decent work, fair wages, the freedom of association, and freedom to bargain are crucial for the realization of a range of human rights. Over the years, the ILO’s support of human rights has become stronger. At the UN in 2014, the ILO clarified where it saw its work relative to human rights:

Given the normative role of the ILO, and the reality that labour rights are human rights, we actively support the UN’s human rights treaty bodies and their vital role in promoting and protecting human rights internationally. ... For the ILO, international labour standards are integral to the larger international human rights framework and, for nearly 100 years, have been the principal means through which the ILO has interacted with stakeholders in the world of work.

The ILO has a **tripartite governance structure**, with representatives from governments, employers, and labourers whose roles are to engage in dialogue and resolve issues. Each party has different activities and responsibilities: States have the role of regulator and are tasked with creating and enforcing labour laws; employer groups may query unclear regulations or problematic enforcement, or can be the subject of complaints regarding the violation of rights; and workers should seek to safeguard and promote their own interests through association and collective bargaining. Having said this, the ILO rarely imposes sanctions on governments or business. Rather it registers complaints in order to send a messages to investors, consumers, and workers.

#### Tripartite Governance Structure

A structure made up of three parts. For the ILO this is business, States and workers.

### 13.2.1 Challenges to Labour Rights in Southeast Asia

Over the years, Southeast Asia has become a popular site for multinationals to base their manufacturing operations. During the period of globalization Asia gained a status, which some consider undesirable, as the ‘world’s factory,’ or the place where most of the world’s labour is done. This term has negative implications suggesting an oversupply of labour, low working wages, eased regulations, investment incentives, and union restrictions. As such, both local and global business enterprises strive to find low paid workers in these regions, forcing Southeast Asian States to compete with one another to remain business friendly. The result is that States have done little to assert workers’ rights while organizational and collective bargaining rarely occurs, all of which gives power to business and leaves workers at a disadvantage.

When States cannot or will not protect workers, for example, by preventing them from collectively organizing and bargaining, the tripartite arrangement that promotes collective solutions to labour rights protection breaks down. Union restrictions are common in the region, as is State control over unions. This may be because unions are not democratic or representative in the case of government organized unions. Or it may be due to a climate of intimidation or restriction that makes employee representatives unable to protect workers’ rights. Southeast Asia has a long history of intimidation and even the killing of union leaders. This may be due to implied links to communism during the Cold War, or more recently, as an effective way to weaken their power. Countries like Thailand have a very low **rate of unionization** in the workforce because workers fear the consequences of joining a union. Overly assertive workers may be seen as burdens and are often driven out of their jobs. As a result, workers in the region organize and bargain informally, rather than through the formal tripartite scheme. Union action like the recent garment strikes in Cambodia and Myanmar do occur, but they are often treated as illegitimate and criminal. More common are scenarios like the **wildcat strikes in Vietnam** or inconspicuous worker networks that seek informal protections and improvements from local officials and owners. These should not be regarded as failures of tripartism, but rather a failure to uphold the standards for tripartite governance.

#### Rate of Unionization

The percentage of the workforce in a union. For developed countries this is about 20%. In Southeast Asia the rate is less than 5%.

Complicating efforts to strengthen union rights is the large number of available workers in the region and the ability of businesses to use migrant labour to both undercut costs and to disempower the workforce. Increasing this problem, it is argued that governments are sometimes too responsive to businesses due to economic incentives. In neo-liberal economies States are being dislocated from their role as regulators and protectors of workers, and instead are supporters of business. Measures such as stricter regulations and higher wages, although good for labour and human rights, are bad for business and unlikely to get support. On the other hand, poor working conditions are bad for business because cutting corners may be profitable in the short run, but workers will quickly leave for better conditions once they appear. With the trends in labour shifting towards more accountability, operating in environments where labour and human rights are not being upheld makes business ultimately unsustainable. Situations where regulations are unclear, below standard, or unenforced, leaves businesses susceptible to punishment or other forms of backlash.



## FOCUS ON Wildcat Strikes in Vietnam

When faced with unfair work conditions, factory workers in Vietnam often participate in wildcat strikes. Wildcat strikes are not formal or announced, and are technically illegal. They do this because their union, the Vietnam General Confederation of Labour, is a national trade union that falls under government authority. Workers will without warning, but for a specific reason, collectively stop working and go outside, or otherwise bring operations to a halt. The managers find themselves facing a collection of workers and a labour shutdown, which gives more bargaining power to workers in discussions for higher wages or better conditions begins. Brokering may occur through dialogue, or workers may simply hold up numbers showing how much they think they should be paid. It will be up to the managers to choose whether to meet their demands or wait for assistance from the authorities. While risky, these kinds of strikes can be effective.

### 13.3 Business Accountability

Despite clear legal responsibilities, human rights continue to be violated as a result of problematic business practices. Businesses seeking the most profitable means of production may try to find the cheapest possible labour by using undocumented migrants or even child labour. Further, businesses using cheap materials may cause environmental damage or produce poor quality products which could make consumers sick. This emphasis on profit has led some businesses to gravitate to States that do not monitor or regulate their operations due to weak environmental or labour laws, making it easier for them to cut corners. Some local and multinational enterprises may even encouraged States to **deregulate** labour or environment laws. In addition, large businesses may source products through smaller enterprises, enabling them to deflect responsibility to the outsourced company. But regardless of how disinterested a business may be, human rights compliance is not something businesses can easily avoid.

Businesses, small and large, local and multinational, should consider more than their profits. In fact, there are good reasons for business to care about human rights. First, compliance can lead to better public relations with consumers. Second, compliance avoids the risk of receiving complaints and court cases which can be very expensive in the long run. Third, care for human rights makes business sustainable in the long term. As a consequence, more and more businesses now see the logic in human rights compliance, and as a result, have introduced appropriate policies and practice. Internationally, the trend has been for businesses to face more monitoring, regulations, and sanctions following human rights violations, but while the general trend is for greater accountability, there is still a long way to go.

#### Deregulation

Deregulation entails the removal of restrictions, regulations, and oversights on private sectors. The logic behind this is to create a freer market, minimize red tape, and attract foreign direct investment.



## Concept Business Accountability

To be accountable means to be responsible for something, and to fix the problems caused by one's actions. There is still much debate over the accountability of businesses. Some enterprises claim they are only accountable to their shareholders and to making a profit, while others consider themselves accountable to their workers and the community. How to hold businesses accountable for their actions is one of the biggest challenges.

### Horizontal Effects

This occurs where the law of public bodies effects private bodies. For example, human rights law, which governs relations between a State and its people (the *vertical effect*), also effects business because States must ensure rights are respected in the private organization.

The unclear legal status of human rights relative to companies is the greatest challenge facing business accountability. Because business cannot sign human rights treaties, they are not directly accountable to them. However, through **horizontal effects** (the duty of States to protect people from violations by third parties), States must ensure corporations in their jurisdiction comply with human rights standards. And while international human rights treaties apply principally to States, they also govern all humans. Furthermore, business is likewise legally subject to international human rights norms, as enforced by the State. One example can be found in non-discrimination laws. When a company employs workers, it cannot do so based on race, religion, or gender. If it does, they can be legally changed because most States have laws against discrimination. So the question becomes less about whether businesses must comply with human rights, but *how* to comply.

### 13.3.1 Corporate Social Responsibility

There is a growing movement within the international community, and in particular the UN, as detailed below, for business enterprises to be more directly accountable for their actions. Accountability can be enforced in different ways. One way is voluntary, where businesses choose to hold themselves to human rights standards. Many companies embrace this self-regulation known as **Corporate Social Responsibility (CSR)**, where a business accepts its responsibility to the community and makes pledges on them. CSR is also known as corporate citizenship, though how the concept is actually understood varies between companies. CSR can be simply ensuring policies and practices are compliant with worker, consumer, and human rights standards. Other versions of CSR may involve running charities or engaging in community welfare activities. Yet another makes use of business-led compliance organizations, such as the **Sustainable Palm Oil Initiative**, which attempts to improve environmental and labour standards in palm oil production.

Some practitioners and activists have been critical of CSR initiatives because they often seem more concerned with marketing than substantive social contributions. Critics also note that the focus should be on whether the actions of a business complies with human rights law, rather than the charity it publicizes. In addition, if a business does not volunteer into this system, there is no way to enforce accountability. Voluntary commitments through CSR are especially problematic from a human rights perspective because these obligations are not mandatory, whereas human rights are. The voluntary approach allows a business to choose whether or not to take action, and gives the option of revoking its commitment at any time. This optional scenario contradicts the mandatory, obligatory nature of human rights. Moreover, voluntary approaches often lack substance. Monitoring, even by an external party, can be manipulated. A business may make public pledges and employ community outreach strategies that are more about brand promotion than human rights.

### Corporate Social Responsibility

CSR is the belief that business has to be responsible for its actions in relationship to employees and their families, to the local community, to the environment, and so on. This can be achieved by ensuring worker safety, social welfare programs, or running charities, for example.





## FOCUS ON Business CSR Initiatives

The following are examples of business-led initiatives in Southeast Asia that address environmental and human rights concerns.

### **The Sustainable Palm Oil Initiative (SPO)**

The palm oil industry is known for its negative environmental impact and its exploitation of labour. As a response, it started the SPO (a major private/public partnership) to find solutions to its own problems through actions like dialogues, certifications, and better planning. This created the Roundtable on Sustainable Palm Oil (RSPO), which led to a number of regional government plans and policy changes.

### **Shrimp Sustainable Supply Chain Task Force (SCTF)**

Another example of an industry-led initiative can be found in the SCTF which operates out of Thailand. This is an international industry alliance of retailers, manufacturers, governments, and NGOs whose purpose is to ensure that Thailand's seafood supply chain is free from illegal and forced labour. The task force has three objectives: (1) to track the supply chain of shrimp and verify the source of shrimps being exported, (2) to improve the codes of conduct in Thai ports, and (3) to improve the sustainability of fishing and reduce its environmental impact.

It should be noted that these types of initiative have attracted criticism. For example, the SCTF has been attacked for selectively excluding certain NGOs and for distracting attention from areas lacking progress. It should also be noted that both the SPO and SCTF were only introduced as their respective industries were facing global scrutiny around worker abuses including forced labour.

## 13.4 Accountability at the UN

The concern with business accountability is not a new phenomenon. Since the 1970s, there were concerns that Transnational Corporations (TNCs) had been complicit in violating people's rights, engaging in corruption, and otherwise violating consumer rights in developing countries. Bodies in the UN such as ECOSOC commissioned studies into TNCs in the late 1970s, and groups of developing States (such as the UNCTAD and G77) complained about their lack of business accountability. During this period, other developments alongside the UN also occurred. The Organization for Economic Cooperation and Development (OECD) adopted the *Guidelines for Multinational Enterprises* (1976), which comprise part of the *Declaration and Decisions on International Investment and Multinational Enterprises*. Unfortunately, the OECD frameworks are only recommendations and guidelines that do not impose mandatory, enforceable obligations. Yet, OECD member States have employed these frameworks in various ways, and the OECD tends to be useful in directing governments and business towards best practices. The 1976 *Guidelines for Multinational Enterprises* also recognized that businesses should ensure workers' rights are respected, the environment is protected, and corruption does not occur.

Another active organization is the ILO, which adopted the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977). Despite the above improvements, a variety of challenges arose in this period. The UN was unable

to reach an agreement because the issue of how to regulate business was too political. Meaningful developments were also halted by the impact of the Cold War, and the developed world's reluctance to agree to new economic regulations as suggested by the developing world. Proposals for a code of conduct were widely debated but never reached the necessary consensus for adoption.

## FOCUS ON

### Business Accountability at the UN

The *UN Working Group on Business and Human Rights* is an accountability and remedy project of the OHCHR. Currently at the information gathering stage, it intends to strengthen the justice mechanisms in cases of serious human rights abuses by corporations.

Another UN body is the *Working Group on the issue of human rights and transnational corporations and other business enterprises*, established in 2011 by the Human Rights Council. This sought to promote the understanding and use of the UN Guiding Principles to collect information on businesses and human rights, to visit States, and to create a dialogue around the issue.

The *UN Forum on Business and Human Rights* is an annual meeting held in Geneva where business, the UN, and civil society discuss issues on accountability.

The UN also promotes corporate responsibility through its *Women's Empowerment Principles*. One example can be found in the UN Women Private Sector Accountability Framework (UNW-PSAF), which enables businesses to measure and improve gender equality in the workplace.

The *Children's Rights and Business Principles* were guidelines developed by UNICEF, Save the Children, and the UN Global Compact in 2010 to ensure companies do not have an adverse effect on children's lives and to maximize the positive impact. The ten principles include the elimination of child labour, safety assurances, and the need to provide decent work for young workers and their parents.

Many of the *Sustainable Development Goals* relate to business standards and accountability, including goals on:

7. Affordable and Clean Energy
8. Decent Work and Economic Growth,
9. Industry, Innovation and Infrastructure,
12. Responsible Consumption and Production,
13. Climate Action



As the next section will discuss, a form of self-regulation called the UN Global Compact (GC) was finally adopted in 1999, but was widely criticized for being too weak. The Working Group on Transnational Corporations then proposed the 2003 *Norms on the Responsibilities of Transnational Corporations* (the Norms) which was accepted by many NGOs and other human rights defenders, but was widely rejected by business itself. Currently, the UN now addresses the impact of business through the UN *Guiding Principles on Business and Human Rights*, and numerous Working Groups promoting the Guiding Principles. While the Guiding Principles improve on the failure of the Norms, it shows that the monitoring of business's impact on human rights is still under development. Presently, the UN Working Group on Business and Human Rights and global civil society are discussing a UN Treaty on Business and Human Rights. This treaty would enable States and rights holders to make complaints, claims, and demand remedy from business. However, until that treaty comes into force, there is no instrument with an enforceable mechanism.

#### **13.4.1 Global Compact (1999)**

After the failure to set up a code of conduct in the 1980s, a different approach was taken by the UN through the promotion of the GC. The GC is voluntary and encourages businesses to increase their CSR in ten key areas. Relying on self-regulation and reporting, businesses themselves study and report on their compliance in these areas. The compact was proposed by the then Secretary General, Kofi Annan, to the business community, who were heavily involved in establishing the GC structure. What makes the GC different from previous initiatives is that it was business-initiated with companies themselves volunteering to participate. They decide on how to implement the principles and undergo a self-reporting mechanism, but no mechanism exists to monitor the enterprise or to criticize it in any way.

Some critics see this as the weakest possible form of protection, while others consider it a first step towards aligning business practices with international human rights and legal obligations. The GC is also different in that it works more as a platform for businesses to highlight their CSR policies and practices. The GC encourages local networks to be established where business and non-business partners can work on best practices to develop their CSR. Further, the GC is explicitly pro-business, as opposed to codes and norms which focus on corporate violations of human rights. The GC has around 8,000 business partners, and another 4,000 non-government partners (such as academics and NGOs). The business partners have committed to principles in the areas of human rights, labour, environment, and anti-corruption, which are listed in the **ten principles**. These principles explicitly mention human rights, noting the major human rights concerns on the effects of business.



## FOCUS ON Ten Principles of the UN Global Compact

*Principle 1:* Businesses should support and respect the protection of internationally proclaimed human rights; and

*Principle 2:* Business should not be complicit in human rights abuses.

*Principle 3:* Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

*Principle 4:* Elimination of all forms of forced and compulsory labour;

*Principle 5:* Effective abolition of child labour; and

*Principle 6:* Elimination of discrimination in respect of employment and occupation.

*Principle 7:* Businesses should support a precautionary approach to environmental challenges;

*Principle 8:* Undertake initiatives to promote greater environmental responsibility;

*Principle 9:* Encourage the development and diffusion of environmentally friendly technologies.

*Principle 10:* Businesses should work against corruption in all its forms, including extortion and bribery.

While there is much support for the GC in the business community and in some sections of the international community, it also faces a number of vocal critics whose concerns are similar to the problems found in CSR. In particular, they point to its voluntary nature, claiming it only ‘preaches to the converted.’ In other words, the only businesses likely to join are the ones that have already met the required human rights standards. Businesses more likely to be involved in human rights violations, especially from the extractive (mining) or military industries, will simply not join the compact. Further, it is possible for businesses to self-report compliance with the principles while hiding violations. An example of this can be seen in the tech industries (like mobile phone makers or social network companies) which often claim to be compliant but actually outsource labour to factories violating these rights, or sell private data to third parties. These actions may not be illegal, but they violate people’s rights. In worst case scenarios, a business may try to use the GC to protect itself from questions or scrutiny.

A second criticism is that the principles themselves are not specific, and the obligations they impose (if they can be called obligations) are minimal. Indeed, concerns have been voiced that businesses can use the GC to improve their image while committing violations. And even if a business has been found to violate rights, little can be done as no sanction mechanism exists to punish it. Finally, buy-in to the GC varies around the world. While many European businesses actively support it, US companies tend not to. Some businesses support it within Southeast Asia but the numbers are low: only six in Vietnam, nearly fifty NGOs, around a hundred in Indonesia, and a hundred in Myanmar, but significantly, most of these are small businesses.

It could be argued that many of these criticisms attack the GC for being something which it is not. The GC is not a monitoring and enforcement mechanism, nor is it supposed to sanction businesses. Rather it is a low cost business initiative whose intention is to encourage companies to develop their CSR profile. In order to increase accountability, other mechanisms are obviously needed, and these were addressed in the following decade with the Norms and Guiding Principles.

#### **13.4.2 UN Norms (2003)**

In 2003, a Sub-Commission of the Human Rights Commission endorsed the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. It must be noted that this document is not legally binding, or even necessarily accepted by other bodies in the UN. In the case of the Norms, it was finally abandoned by the Human Rights Commission after its introduction, and the task to make business accountable moved elsewhere in the UN.

The Norms were fundamentally different to the GC in that they were not voluntary and imposed obligations directly on business, not on States. The Norms declare that:

Transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights.

Up to this point, no document had said directly that business had these obligations as normally it was the responsibility of States to ensure business compliance. The Norms did not mention States at all in its obligations which led to much criticism from the business sector, but also from some States. Concerns also arose about the vagueness of the legal obligations, the lack of voluntary buy-in, the sanctions it proposed, and the obligations on business to promote human rights. With current standards now arguably approaching those suggested in the Norms, this document can be considered ahead of its time; back then, the international community was certainly not ready, neither legally nor politically, to accept stronger or direct business accountability.

#### **13.4.3 UN Guiding Principles (2011)**

The most recent action undertaken by the UN is the *Guiding Principles on Business and Human Rights*, endorsed by the Human Rights Council on 16 June 2011, sometimes known as the “Protect, Respect and Remedy” Framework, also called the Ruggie Principles. The principles were first introduced by John Ruggie (the Special Representative for Business and Human Rights) in 2007, before being developed into the guidelines. With its 31 principles, the Guiding Principles is the global standard regarding the roles and responsibilities of States and businesses. This framework clarifies how States and business should understand and implement their human rights obligations. The Guiding Principles are a step back from the Norms as States, and not businesses, were given primary responsibility to enforce human rights by stressing in the preamble that “the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State.” Following this is the framework on which the Guiding Principles are grounded:

- (a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

The duties and obligations to protect are more demanding than responsibilities to respect rights. This is clear in the Guiding Principles where an emphasis is placed on the legal obligations of the State, whereas corporations “address” or “may undertake” activities, “avoid causing” or “seek to prevent” violations. For some, this means the obligations on businesses are too weak. The final part of the framework mentions the remedy, which is introduced as:

- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The remedies proposed fall into two categories: (1) State-based legal mechanisms, and (2) alternative justice mechanisms. These alternative mechanisms can address grievances committed by both State and business and allow for violations to be rectified by compensation and other payments, without the need for a court remedy. The three elements of the framework will now be addressed in more detail.

## DISCUSSION AND DEBATE

### Is it better to compromise or pressure business?

The difficulty faced by the various UN attempts at creating business accountability can be seen in the debate between the need for low entry costs which encourages business involvement and weak obligations (such as the Global Compact or Guiding Principles), and enforceable accountability such as the failed code of conduct and the Norms. Which of these arguments is better?

- It is better to have low entry costs and voluntary participation because business is more likely to work with these. This is done by imposing weaker obligations, and gradually working towards more accountability. Imposing strict standards will only alienate businesses, discouraging them from joining initiatives, and few avenues exist to enforce accountability anyway.
- It is better to enforce the laws because businesses will only comply when forced to. Because business works primarily by profit, they will only become accountable to rights if they have to. Business has no history of voluntarily submitting to regulation. If voluntary, only law abiding businesses will join, not the rights-violating ones, defeating the purpose of a standard.

#### 13.4.4 Guiding Principle 1: Protect

The State has a duty to protect the human rights of people within its territory against human rights abuses by third parties, including business. This duty necessitates policies, regulation, and enforcement. The Guiding Principles provides five specific measures for States, demanding:

- Coherent policies to engage business
- The promotion of human rights in business transactions and operations
- The fostering of corporate awareness of human rights



- Planning policies and guiding measures for conducting business in conflict-affected areas
- Examining human rights in extraterritorial business situations, such as when a business is working in a foreign country

Protection entails active regulation so States cannot avoid responding to violations. Unfortunately, in Southeast Asia and elsewhere, deregulation seems more pronounced than regulation.



## FOCUS ON

### Guiding Principles on Human Rights and Business – General State Regulatory and Policy Functions

3. In meeting their duty to protect, States should:

- (a) Enforce laws that ... require business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies ... of business enterprises ... do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

#### 13.4.5 Guiding Principle 2: Respect

Businesses have a responsibility to avoid infringing human rights. This responsibility applies to all aspects of business operations. In order to fulfil it, businesses must act with **due diligence** to ensure that they do not adversely impact human rights. When a business has an adverse impact on human rights, directly or indirectly, it will fail in its obligations under international human rights law. Business cannot simply hope to not undermine human rights. Instead, plans, policies, research, and oversight must occur. Transparency is necessary to ensure due diligence. In other words, businesses have an obligation to take steps to avoid violating rights to prevent human rights violations before they occur.

According to the Guiding Principles, all businesses should have a human rights policy that provides an overview of plans and procedures to ensure that human rights are respected. This means that businesses should review all their activities and relationships to ensure they are not adversely impacting human rights. Further, businesses are expected to mitigate any threats to human rights. These reviews should be ongoing, and any potential areas of concern must be investigated. Should a human rights issue surface, businesses should take a number of steps to ensure due diligence: consultation with all affected groups, dissemination of any findings, remedy of any direct or indirect violations, and follow-up to ensure all human rights issues are adequately addressed.

#### Due Diligence

This refers to the necessary actions to ensure laws are respected and includes activities such as monitoring environmental impact and workplace safety.

The responsibility of businesses to respect human rights means they should also be aware if it is the State that violates rights. If businesses or investors are in any way involved in violations, even if the State is doing the violating, they are taking part in the violation of human rights. Businesses that profit from oppressive governments are failing to fulfil their responsibility to respect human rights. Investors are attracted to Southeast Asia because of low taxes, low labour costs, cheap land, and relaxed regulations, all of which can increase profits. However, these incentives may be the result of governments violating rights, such as the confiscation of land or the oppression of organized labour. One specific area of concern are Special Economic Zones (SEZs) which attract foreign direct investment through incentives such as tax concessions, less regulations, and other economic advantages. An SEZ may be established to avoid respecting rights, for example by having special weak labour or environmental laws. If this is the case, the business still is accountable for the violations even if it is the government which has created the conditions for them.

### 13.4.6 Guiding Principle 3: Remedy

Both States and businesses have a responsibility to ensure that victims have access to effective remedies, both judicial and non-judicial if their rights are violated. The State, the business, and the person or community may all have a different notion of justice. Should a human rights issue surface, businesses are to take a number of steps to ensure due diligence such as consultation with the affected groups, dissemination of any findings, remedy of any direct or indirect violation, and follow up to ensure that all human rights issues are adequately addressed. Remedies have been criticized by some observers as reactive, rather than proactive as they do not prevent a violation from occurring and rather only address problems after the violation. Moreover, remediation is often hard to define. Depending on who seeks the remedy, it could be an apology, a fine, a change of business practice, compensation, or a criminal charge.

## FOCUS ON

### Where do the guiding principles fit?

The Guiding Principles are in an era of new expectations. From a normative perspective, they currently form the established standard in business and human rights. Compliance with the Guiding Principles implies compliance with the UN Global Compact and the OECD Guidelines for Multination Enterprises, but not vice versa. The principles also declare that businesses have a responsibility to respect labour rights (ILO Conventions) and human rights international treaties regardless of where they operate. Compliance with international labour and human rights norms are not optional, and businesses are to uphold these standards irrespective of where they operate. Even if States fail in their duties, as many do, businesses must still ensure compliance with human rights. Until a treaty on business and human rights enters into force, the Guiding Principles will be the standard to which all businesses and States will ultimately be held to.





## 13.5 Responding to Business Violations in Southeast Asia

Because accountability is still a developing practice, there are a variety of ways to make businesses accountable in Southeast Asia, each with their strengths and weaknesses. The legal system is still commonly used. Legal remedies are a constantly evolving method of accountability at both the domestic and international levels. As previously mentioned, the UN Working Group on Business and Human Rights is also considering a treaty on business and human rights which could significantly expand the possibilities for legal remediation. Another evolving form of legal accountability is the concept of extra-territorial obligations. As detailed below, this is an attempt to enforce business standards across borders to enable States to hold businesses accountable even if violations occur in another country's jurisdiction. In every country in Southeast Asia, attempts have been made to hold businesses accountable to rights, either through the courts, consumers, civil society organizations, or trade unions. The next section will summarize how each of these responses work in practice.

### 13.5.1 Legal Actions Against TNCs

Over the years, many cases have been lodged against businesses for violating workers' rights, impacting economic and social rights, or environmental destruction. Unfortunately, taking a business to court in Southeast Asia is challenging. Most commonly businesses are not found liable, and courts rarely award compensation to those whose lives have been affected. Even if they do enforcing payment from the companies can take years. Simply getting access to a court can be difficult as there are cases where security personnel employed by businesses have physically stopped people reaching a court. In other instances, businesses have used courts to target individuals or communities through defamation suits, or courts may simply not be willing to hear cases because the law is unclear, a situation common in land disputes in Myanmar and Cambodia. In these countries, many people own their land not through written documents but by customary ownership, meaning they have always lived there. In these cases, governments can simply assert ownership of the land as all land is owned by the State. Even if the case reaches court, claimants may find a justice system more sympathetic to business than local individuals. This may be the result of businesses having money to employ better lawyers capable of intense legal preparations but it may also be due to corruption, or the courts wanting to protect development over the rights of poor people.

## CASE STUDY

### Xayaburi Dam Court Case

Though the \$3.5 billion Xayaburi Hydropower Project officially started in 2012, construction had already been going on for two years leading to the first dam of the Lower Mekong River, affecting the neighbouring countries of Vietnam, Cambodia, and Thailand. The project involves building 12 dams for hydro-electricity, displacing over 2,000 people and potentially affecting the livelihoods of up to 200,000 people. Construction is underway in northern Laos, and the dam is set to open in 2019. Thai officials agreed to the project as financiers, builders, and buyers of the electricity.

Attempts were made to delay the construction in order to understand the impacts, but an environmental impact assessment was never done. The Mekong River Commission (MRC), an international body which manages the river, failed in its attempts to



reach an agreement between Laos and its neighbours. As such, the actions taken by Laos violated the 1995 Mekong Agreement between Cambodia, Laos, Thailand, and Vietnam, which requires agreement with its neighbours before building a dam. Instead, Laos made an agreement with Thailand alone, who helped finance the project and agreed to purchase 95% of its electricity.

In 2014, a suit by 37 villagers in eight provinces in north and northeast Thailand living along the Mekong was filed against five Thai government bodies involved in the project, and was accepted by Thailand's Supreme Administrative Court. They claim these governing bodies violated the Thai Constitution by entering into an agreement without doing due diligence as regards public approval, or its impact on the environment, health, and human rights. On 6 January 2016, the Thai Administrative Court ruled that the governing bodies were fully compliant with the Constitution maintaining that State agencies complied with Thai law by posting project information on their website. However, the plaintiffs appealed the case, calling for an impact assessment, full compliance with Thai law, and consultation with those affected by the project. Overall, this project violates the right to a clean environment, including the rights of individuals and communities to access their natural resources, to conserve the environment, and to participate in decisions that might affect access or conservation. The case is transnational as it will rule on a business project in Laos using Thai law.

A more common kind of court case occurs around labour rights. Most, if not all countries in Southeast Asia have developed labour laws. However, more improvement is needed in areas such as freedom of association and collective bargaining, as well as gender and non-discrimination which often leads to unfair dismissal. Examples of these include women who are sacked after becoming pregnant (a policy of Malaysia Airlines), or after they gain weight (for example, Thai Airlines imposed weight and waist line limits on flight attendants). Another concern involves poor conditions and non- or under-payment of wages, a problem migrant workers frequently face (see Chapter 7). Further, workers may not get access to compensation after accidents, or may be sacked for joining a trade union, or participating in a strike, though both these actions should be protected by human rights.

### 13.5.2 Extraterritorial Obligations

Another development in the use of court actions against business violations concerns the use of **extraterritorial obligations** (ETOs) linked to the **Maastricht Principles**. This is a very recent development based on the idea that the duty of States to protect rights does not end at the border, and if an organization violates its rights in another country, the State will still have an obligation (an extraterritorial one) to prevent violations. This new development is of particular importance to Southeast Asia because of the Bangkok *Declaration on Extraterritorial Human Rights Obligations*, drafted in the region. Also, extraterritorial obligations are actively used in Southeast Asia. For instance, the Thai National Human Rights Commission is currently investigating four extraterritorial cases: sugar plantations in Koh Kong, Cambodia; the Hat Gyi dam on the Salween River in Myanmar; the Hongsa lignite mine and coal-fired power station in Laos; and the Xayabour dam, also in Laos.

#### Extraterritorial Obligations

These are obligations which can occur outside the jurisdiction of the State requiring them. For example, a business, under its national laws, can be legally obligated not to engage in corruption in any country, regardless of its legality in the foreign country.



## FOCUS ON

### Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights

The Maastricht Principles details the obligations of host States (where business operations occur) and home States (where a transnational business is headquartered or incorporated). Extraterritorial obligations place the primary responsibility for protecting human rights with host States. But home States also have a responsibility to hold businesses under their jurisdiction accountable for their impact on human rights. This puts the primary burden on host States, but asks home States to hold businesses accountable extraterritorially.

Currently these examples are not court cases but rather National Human Rights Commission investigations, and the Commission does not have the power to start a case or compel compensation, as this will be decided by the courts themselves. However, these investigations are a positive step towards increased business accountability by limiting the ability of business to escape sanctions by conducting business in third countries.



## CASE STUDY

### Koh Kong Sugar Plantations and Extraterritorial Obligations

The Thai Khon Kaen Sugar Industry set up plantations in the Koh Kong region of Cambodia in August 2006 after receiving concessions from the Cambodian Government under the joint ownership of the Khon Kaen Sugar Industry, the Taiwanese Ve Wong Corporation, and Cambodian Senator, Ly Yong Phat. It is estimated that 4000 villagers were forcibly and violently evicted in the setting up of the plantations. They also claimed they were never consulted on the deal. In 2007, a group of villagers filed a complaint to the Koh Kong Provincial Court which refused to hear the case on jurisdictional grounds. The villagers appealed and their case is still moving through the Cambodian judicial system. In 2009, Koh Kong Sugar entered into a five-year contract with Tate & Lyle (a UK-based sugar business that is also a subsidiary of American Sugar Refining). Tate & Lyle began to buy sugar from the plantations. In 2013, 200 villagers filed a complaint in England against Tate & Lyle, arguing they were the rightful owners of the land and sugar. The legal strategy in this case is to focus the complaint more on property and contractual rights rather than human rights violations, though clearly human rights violations are part of the complaint. The lawsuit is ongoing.

### 13.5.3 Consumer Activism

So far, the focus has been on legal and quasi legal frameworks and responses to business accountability. This final section will concentrate on how social movements have responded to business violations of human rights. These alternative ways of complaint are particularly important if the court system is viewed as unsympathetic. With the rise of social media allowing consumers to easily express their feelings about products and services, businesses have to consider their public image like never before. A company seen to harm the environment, mistreat workers, or marginalize

communities, may face consumer boycotts. Famous protests and boycotts such as those against Nestlé, Nike, and McDonalds, have forced companies to change their practices. This method of accountability can be very effective, but only if consumers with adequate buying power engage in it. Consumer activism, like all types of responses to predatory business, has both potential and limitations.

The most common form of consumer activism is the consumer boycott. Though there were boycotts of sugar produced by slaves in the 1700s, the first modern consumer boycott occurred in the late 1970s against Nestlé for their attempt to persuade mothers to switch from breastfeeding to baby formula despite the fact it was widely recognized that breast milk was nutritionally superior to formula, and it was also free. When it became known that Nestlé was paying nurses and hospitals to encourage women to use formula to the detriment of baby's health, a boycott was organised, eventually forcing the company to change its behaviour.

Other notable boycotts include those of Nike (for the exploitation of workers in Indonesia and other factories) and Shell (for the execution of activist, Ken Sara-Wiwo, in Nigeria who complained about pollution caused by their pipe lines). Sometimes it is a product rather than a single brand which is boycotted. For example, 'blood diamonds' (diamonds originating from conflict zones in Africa and whose value is used to fund armed groups) continue to be targeted. Israeli businesses have also been the target of the Boycott, Disinvest, and Sanction (BDS) movement addressing Israel's mistreatment of Palestinians. Boycotts have spread to entire countries too such as in the 1990s when tourism to Myanmar was discouraged to prevent the profits going to the military government.

Boycotts have a mixed success rate. While Nestlé changed its practice, the boycott of Shell did not have any impact. Though the Nike boycott received much publicity, its commercial impact was debatable, but Nike did eventually change their labour practices. In this sense, even if a consumer boycott does not directly threaten business profits, it can set in motion a process that extends to improvements in human rights. In the same way that trends in legal frameworks now seem to offer more avenues to hold businesses accountable, social media has done the same through consumer campaigns. Platforms like the Centre for Business and Human Rights have become hubs where consumers can gain awareness on products and brands and directly participate in global campaigns against injustices in the field of business and human rights.



## CASE STUDY

### Boycotts of Thai Fisheries

*The Guardian*, a UK-based news outlet, ran a series of articles and videos with titles such as ‘Globalised slavery: how big supermarkets are selling prawns in supply chain fed by slave labour’ and ‘Shrimp sold by global supermarkets is peeled by slave labourers in Thailand’ that went viral throughout 2014 and 2015. These stories became the rallying cry around which governments and consumers around the world criticised Thai Fisheries. Governments around the world criticised the prevalence of human trafficking, and the EU gave Thailand a yellow card (or a threat to issue a trade ban) against the industry. Some consumers filed lawsuits against Mars, Procter & Gamble, Nestlé, and Costco Wholesale for selling slavery-tainted seafood products such as farmed shrimp and pet food. Others boycotted products or food retailers buying from Thai Fisheries. The boycotts have since relaxed, but they did compel both government and business action around Thai Fisheries. Whether those efforts will lead to substantive improvements is yet to be seen.

## 13.6 The Global Economy and Human Rights

A final point to note in the relationship between business and human rights is the role of the global economy. Human rights can be affected by the global economy in many areas, the main ones being international trade and the policies of global economic and financial organizations. The following section will look briefly at these two areas.

### 13.6.1 International Trade and Human Rights

The increase in international trade itself is not necessarily bad for human rights. For developing countries, increasing the amount of trade can bring wealth, develop industries, and create jobs. On the other hand, an unfair trade system can do exactly the reverse. If developing countries are forced to buy expensive goods from richer countries, and if their local industries cannot compete, jobs will be lost and the cost of living will rise. Though this may not have a direct impact on human rights, there are concerns that a weakening economy will have long term impact on people’s rights. Studies have shown that when developing countries become dependent on food imports, they leave themselves open to many risks. If their agricultural production decreases and the price of food increases, food becomes prohibitively expensive. Such a situation happened in the Caribbean nation of Haiti which lived off cheap American imports, until food prices increased as a result of shifts in oil prices and the agro-fuel industry, causing over a million people to go hungry. Similarly, in Southeast Asia, the 2007 global food crisis (when the price of grain sometimes tripled in cost) led to food riots in Indonesia and shortages in Myanmar. The Philippines was also heavily affected as it is one of the largest rice importers in the world. Other Southeast Asian countries like Thailand and Vietnam benefited greatly from the price increases as they are among the largest exporters of food in the world. This example shows that the benefits of global trade are often not equally shared, some countries can get rich and others poor. Another concern is that countries are now more susceptible to fluctuations in the global markets. Nobody is exactly clear why food prices increased so dramatically in 2007—the theories include stockpile shortages, speculations in the market, an increase in bio-fuel production, and increased production costs—but nobody could stop the increase, leading millions to the brink of starvation.



## FOCUS ON

### The Trans Pacific Partnership (TPP)

The trade agreement now receiving the most attention is the TPP. Currently, four Southeast Asian States are party to the agreement: Singapore, Malaysia, Vietnam, and Brunei, with the Philippines, Thailand, and Indonesia expressing an interest. There is much debate about the impact of TPP on human rights. While claims have been made that the TPP has led to strong environmental regulations, which is disputed, and reduced tariffs that could potentially improve the economy of many developing countries, concerns exist about weak labour protection, reduced freedom of expression, and the increased enforcement of intellectual property which will impact health through the increased prices of medicine. Concerns are being expressed about the secrecy surrounding its negotiation, leading some to speculate that it gives preferences to corporations and excludes civil society.

The World Trade Organization (WTO), the main body which manages global trade, has been criticised for not taking human rights seriously enough when reaching trade agreements. One of the most vocal concerns is around Trade Related Intellectual Property (TRIPs) and people's access to medicine. During the peak of the AIDS crisis in the 1990s drugs were available to keep people with the HIV virus alive, but at a cost of up to \$15,000 a year per person, which was way out of reach for most people in Southeast Asia. Much cheaper options of only \$1 a day were available, but only because they were produced by companies not paying the associated intellectual property costs. When countries like Thailand chose to use the cheaper medicine the pharmaceutical companies and the United States government protested saying they should pay for the intellectual property rights. Other areas of concern include the weak recognition given to labour rights in trade. There is no incentive for States to avoid using goods produced by slave labour, although some countries and regions have responded in their own way, for example, when the European Union banned the import of prawns suspected of having been processed using slave labour as previously discussed.



## DISCUSSION AND DEBATE

### Should governments ignore TRIPs when it comes to life-saving medicines?

The case of Thailand producing its own drugs to treat AIDS patients has been the source of much debate. Pharmaceutical companies argue they have invested millions of dollars to develop these drugs and deserve to be reimbursed. Further, if the actual price of the drugs is not met, they argue investment in more research and development will not be possible. On the other hand, Thailand has a duty to provide medicine to its people to ensure their right to health, and these drugs do save people's lives. Because of this, both Thailand and the WTO allow the purchase of drugs without paying intellectual property costs to pharmaceutical companies.

#### Questions

- Should countries be able to avoid intellectual property costs to buy cheap drugs if it saves people's lives?
- How will new drugs be developed if companies see no profit in investing in the research because of countries will just buy cheaper copies of their drugs?
- On the other hand, pharmaceutical companies claim they investment in research and development but they mostly focus on more 'cosmetic' drugs to aid weight reduction or reduce blood pressure, neither of which are common problems in poorer countries. Does this mean we should not take their claims of intellectual property rights seriously?

### 13.6.2 Global Finance and Human Rights

Global financial organizations like the International Monetary Fund (IMF), the World Bank (WB), and the Asia Development Bank (ADB) have faced criticism because their policies can lead to human rights violations. So much so that recently, Philip Alston, the United Nations Special Rapporteur on extreme poverty and human rights, said in a report that, "The World Bank is a Human Rights-Free Zone." They are criticized for being dismissive of human rights or having policies, such as the IMF actions after the global financial crisis of 1997, which negatively impact rights (previously noted Chapter 12).

During the 1980s and 1990s, most criticism was directed at the **Structural Adjustment Programs (SAPs)** which forced some countries' economies to be change their economic structure to be more market-oriented and less government controlled. These changes included opening markets to foreign investors and forcing governments to reduce their involvement in economic activities by **privatizing** some services such as water, electricity, health, and communications. As a result, domestic industries faced increased competition from foreign business and many lost their jobs and livelihoods. Though SAPs have not been used for many years, the policies of these international organizations still tend to prioritize open market economies over States' obligations around health, livelihood, and education. While this does not necessarily mean that the policies will cause violations - for open economies do allow economic growth and increased wealth - the lack of safety mechanisms to protect those most affected by these changes is of concern. To conclude, it can be seen that the IMF, the WB, the WTO and the trade agreements they have brokered may favour business over human rights, and do not do enough to make businesses accountable.

**Structural Adjustment Programs (SAPs)**  
SAPs require States, if they need money from the IMF, to adjust the structure of their economies based on free markets which should also be open to foreign investment.





## DISCUSSION AND DEBATE

### Privatization, Nationalization, and Human Rights

Privatization is the sale of State-owned businesses, services, or resources to the private sector. States may do this if the private sector is seen as more effective or efficient, or if the private sector can generate more revenue. Neo-liberalism promotes privatization because it allows the public to pass costs for infrastructure and services to the private sector through processes like licensing, tax, and cost sharing. The concern with privatization is that benefits may not reach the masses, so, for example, when goods and services are privatised, State may save money but because those goods and services are no longer subsidized, citizens may also see their bills go up.

The arguments for privatization are:

- Private companies are better at running businesses
- Considerable revenue can be raised from the sale of public goods
- There is less corruption in private companies
- The arguments against privatization are:
- Some people cannot afford the costs
- Companies are only interested in profit
- The services provided by profit-driven companies may be inadequate

#### Discussion

If the below services are privatized, or only run by private companies, what are some potential human rights concerns?

- Public transport
- Prisons
- Water
- Mobile phones
- Internet access

In thinking about these concerns, consider the following:

- Should these services be accessible to everyone?
- What is the impact of the costs of such services on the poor?
- Is the service a fundamental right? Should they always be provided by the State?
- Will the different quality of services make society more unequal?



To sum up, this chapter has shown the many attempts at making business more accountable with varying levels of success. Over the years, while there are a number of UN initiatives, the more successful mechanisms have been initiated by individuals whether they be civil society initiated protests, boycotts, or court cases at the national level. Finally, the significant impact of banks and financial institutions on human rights must also be noted. When a country is in debt, governments may cut spending from much needed public services and social welfare, directly impacting rights.

### **13.7 Worker Resiliency and Self-Protection**

To close this chapter, it would be useful to return to the concept of the worker as a person whose rights can be significantly reinforced or undermined by business. Although different legal frameworks have been introduced to impose obligations on business and States, these can be hard to keep, though more opportunities for legal protection are becoming available. Both the UN and the ILO will play a major role here although local governments and consumers can also be influential. In addition, governments can demand appropriate practices from businesses under their jurisdiction despite adverse impacts abroad. Further, consumers may send a strong message to businesses by simply abandoning their products or brands, threatening the very lifeline of businesses – profit.

For many workers and communities in Southeast Asia, the law may not provide a dependable source of protection or accountability, but this does not leave these groups helpless. When laws or organizations provide inadequate protection, workers and communities can take it upon themselves to protect their own interests which allows Workers and communities that engage with businesses themselves will no longer be passive recipients of protection. By creating informal or formal networks to distribute information and by sharing experiences and ideas, workers can bargain effectively with businesses and protect themselves and others from potential violations. Work and business can be a potent pathway to empowerment allowing workers to save money and send remittances home, so changing not only their lives but also the communities they invest in. Ideally, workers and communities should not have to rely so heavily on self-protection but while formal regimes slowly evolve, the reality is that people will have to continue to find informal ways to protect their rights.

## **A. Chapter Summary and Key Points**

### **Introduction to Business and Human Rights**

Business providing jobs, goods, and services may be meeting people's rights, yet at the same time it can violate rights. Business seeking to maximise profits may use cheap labour, cheap materials, and cheap production causing environmental damage, poor quality products, worker violations, or engage in dangerous or corrupt practices. Since human rights protect people from State and not business abuse, holding businesses accountable has proved a challenge. Business must obey national laws, but as corporations, their legal status and international structure can help them to avoid facing justice.

## **Labour Rights as Human Rights**

The ILO promotes and protects labour rights such as the right to work, the right to just and favourable conditions at work, and equal pay for equal work. The ILO comprises representatives from governments, employers, and labourers. In monitoring labour rights, it can (but rarely does) impose sanctions. Challenges to labour rights in Southeast Asia include: the oversupply of labour, low working wages, weak regulations, and union restrictions. States have done little to assert workers' rights and organizational and collective bargaining rarely occurs. Many unionists are threatened, resulting in weak labour rights.

## **Business Accountability**

Through horizontal effects, States protect people from violations by third parties such as business. But this does not clearly enforce human rights accountability on a business. One response is CSR where a business accepts its responsibility to the community and makes pledges to them. Critics regard CSR as more concerned with marketing than substantive social contributions, and it is also voluntary. Many businesses promote their contributions to society through charity and social events, but the concern is whether they also protect human rights. There are many ways to hold businesses accountable to human rights. One way is to promote self-regulation on a voluntary basis. Another is through the use of judicial or quasi-judicial measures to punish businesses for non-compliance. Finally, consumers, workers, and communities can take it upon themselves to force improvements in the field of business and human rights.

## **Accountability at the UN**

The UN has attempted both voluntary, business-friendly, and mandatory assertive measures. Since the 1970s, concerns about TNCs and violations of consumer rights in developing countries have led to the development of guidelines and declarations on TNC practice from the UN, the OECD, and the ILO. But these are only recommendations and guidelines and are not legally binding. More recently, the UN Global Compact and the Norms were introduced, neither of which were successful. The Global Compact was voluntary and encouraged businesses to increase their CSR in ten key areas. While some saw it as a weak form of protection, others considered it a first step towards accountability. The Norms differed in that they were not voluntary and imposed obligations directly on business, but they were not supported and were eventually dropped. Currently, the UN Guiding Principles which do not impose legal obligations on companies are the authority in this field.

## **Responding to Business Violations in Southeast Asia**

The legal system is still commonly used to enforce business standards, but taking a company to court in Southeast Asia is challenging. Human rights victories in cases involving businesses are few, and rarely is compensation awarded to those whose lives have been affected. Some cases on labour rights have been successful. One legal development involves the use of extraterritorial obligations in court, where a company in one country can be sued for its actions in another. Finally, with the rise of social media allowing consumers to express their feelings about products or organise a boycott of a product, consumer activism has become a successful method of accountability.

## **The Global Economy and Human Rights**

International trade and the global economy have many implications for human rights. International trade is not necessarily bad for human rights as developing countries can increase wealth, develop industries, and create jobs. But an unfair trading

system can do the reverse. Examples such as the 2007 global food crisis show the benefits of global trade are not equally shared, with some countries getting richer and others becoming poorer. The WTO has been criticized for ignoring human rights in trade agreements, especially around Trade Related Intellectual Property. The IMF, World Bank, and ADB are criticized for being dismissive of human rights, especially as regards their Structural Adjustment Programs (SAPs) during the 1980s and 1990s. SAPs led to privatization and open market economies threatening States' obligations around health, livelihood, and education.

### **Alternative Measures**

Consumers and workers have the ability to push back against businesses not fulfilling their human rights duties. Opportunities arise from legal frameworks which seek to hold businesses accountable. In addition, communication technology has created new opportunities for workers and consumers to organize, build awareness, and take action.

## **B. Typical exam or essay questions**

- Examine a court case against a business in your country. What rights did the business violate, and what was the outcome of the case? Do you think it was fair?
- Are transnational companies a necessary evil for developing countries, given that they may provide jobs and economic growth but at the same time violate rights?
- How can extraterritorial obligations be used to increase business accountability?
- What are the strengths and weaknesses of the United Nations Guiding Principles on Business and Human Rights? How can they make companies accountable, and how can companies avoid this accountability?
- Are trade unions active in your country? Why, or why not?
- What is the relationship between global trade and human rights in areas such as access to medicine or communication technologies?

## **C. Further Reading**

### **Business and Human Rights**

For cases, commentary, and general information on development and human rights, an internet search of the following authors will reveal useful articles, books, and other resources:

- John Ruggie
- Surya Deva
- David Kinley
- Andrew Clapham

Web pages with resources include:

- Business and Human Rights Resource Centre: a web page with extensive case studies and news
- Forum-Asia: this NGO has released the report *Corporate Accountability in ASEAN* with many useful case studies on business activities in the region
- *Guidebook for Business and Human Rights for NHRIs*: a useful introduction
- Canadian Human Rights Commission: useful introductions including *Human Rights and Business 101* and *Business and Indigenous People's Rights*
- Human Rights Watch (HRW) and Amnesty International (AI): both these organizations have programs and research on business and human rights
- Office of the United Nations High Commissioner for Human Rights (OHCHR): a number of publications including FAQs and introductions to the Global Compact and Guiding Principles
- UN bodies: UN Secretary General's Special Representative on Business and Human Rights, the Forum on Business and Human Rights, and the Global Compact: all have useful resource material
- International Labour Organization (ILO): has no program on business and human rights, but it covers multilateral enterprises, globalization, labour law, development, and so on
- University research centres: many have research papers, including New York University, Harvard University, the Danish Institute for Human Rights, and the think tank: Institute for Human Rights and Business (IHRB)
- *Business and Human Rights* journal